No. 20,428

United States
COURT OF APPEALS
for the Ninth Circuit

ARTHUR ANDERSON and CLATSOP FISHERIES, INC., an Oregon corporation,

Appellants,

v.

GENE R. NADON, DOROTHY IRENE NADON, and JATABORO CORPORATION, a corporation,

Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for the District of Oregon

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BRIEF OF APPELLEES

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SUPPLEMENTAL STATEMENT OF THE CASE

On December 6, 1964, a collision occurred between the FV EAGLE and the FV BETTY upon the high seas in international waters. The FV BETTY sank within five minutes thereafter (R. 2). At the time of the collision FV BETTY was drifting and, under the International Rules of the Road (33 U.S.C. § 1061, et seq.), underway without proper lights and without any member of the crew on watch (R. 2).

Subsequent to the collision, appellees, as owners of the FV EAGLE, were notified of separate claims being asserted against them on behalf of appellant Clatsop Fisheries, Inc., owner of the FV BETTY and of her captain, appellant Anderson (R. 3). Later, notice of two additional claims was received from the crew members of the BETTY by letter from their attorney alleging loss of gear, clothing, wages, and other injury (R. 2; Vol. II, R. 7-8).

Following receipt of the aforesaid claims, appellees caused the EAGLE to be appraised by independent surveyors, who set her value at $32,000 (R. 7), timely filed their petition for limitation of liability pursuant to 46 U.S.C. §§ 183-189, and submitted their ad interim stipulation for value in a sum of $35,000 (R. 3).

In due course, respondents-appellants Arthur Anderson and Clatsop Fisheries, Inc. filed their claims and answers alleging a total loss of $90,000 which was, of course, substantially in excess of the appraised value of the FV EAGLE (R. 18). The answer denied that petitioners were entitled to exoneration from or limitation of liability and alleged that petitioner's vessel was unseaworthy, her master and crew negligent, all with petitioner's privity and knowledge (R. 18). In addition, said appellants specifically excepted to the value placed on the FV EAGLE and to the ad interim stipulation for value (R. 17).

SUMMARY OF ARGUMENT

The instant case involves a maritime catastrophy with a multiplicity of claims which clearly exceed the liability of the owner under the Limitation Act. The case is one which is traditionally and peculiarly maritime in nature, all issues are contested by appellants, and the District Court properly exercised its discretion in declining to dissolve the statutory injunction (46 U.S.C. § 185) enjoining against prosecution of claims in other forums.

ARGUMENT

I

The Instant Case Involves Multiple Claims which Greatly Exceed the Value of the Limitation Fund.

At the time of filing the petition, the owners and operator of the FV EAGLE had received individual claims from two crew members of the BETTY (R. 3) and had been notified of other claims on behalf of both the corporate owner and the captain of the FV BETTY (R. 3).

After the filing of the petition for limitation and, together with their claims, answers and exceptions, appellants Anderson and Clatsop Fisheries, Inc., applied for dissolution of the injunction against other suits or actions arising out of the collision. It was alleged that Clatsop Fisheries, Inc. wished to file a proceeding in the Oregon state courts against petitioners for the loss of the FV BETTY. As a device to circumvent the Limitation

Act, appellants contended that they had reduced the number of claims by "advancing" to the individual crew member respondents "the amount of their respective claims" for which appellant Clatsop Fisheries, Inc. was acting as "trustee" (R. 21). In addition, appellants alleged that if the injunction was dissolved, and an action was thereafter prosecuted to judgment against petitioners in the Oregon state court, appellants would not (1) "claim as res judicata the personal liability of petitioners established in the state court action" but would agree that the same might be the subject of a subsequent, independent redetermination by the United States District Court and (2) would not seek to enforce and collect any judgment obtained in the state court except "in and through these (limitation) proceedings" after decision upon the same (R. 21).

One of the salient purposes of the Limitation Act is to eliminate a multiplicity of litigation and provide concourse for the determination of liability arising out of marine casualties where asserted claims exceed the value of petitioner's vessel. See, *Maryland Casualty Co.* v. *Cushing,* 347 U.S. 409, 413-418 (1954); *Providence and N. Y. Steamship Co.* v *Hill Mfg. Co.,* 109 U.S. 578 (1883). In the instant case, it is apparent that there are at least four separate claims because appellants' Stipulation and Motion seeking to dissolve the injunction asserted an individual claim by Arthur Anderson for personal effects (R. 20), claims on behalf of the two individual crew members as "trustee" for them (R. 21), and a claim by Clatsop Fisheries, Inc. for loss of the FV BETTY. The total claims far exceed the proposed limitation fund (R. 19).

Insofar as the general principles involved, this case is almost on all fours with *Pershing Auto Rentals, Inc.* v. *Gaffney,* 279 F.2d 546 (5th Cir. 1960) which was relied upon by the District Court in its order of August 10, 1965 refusing to dissolve the injunction against collateral proceedings (R. 29, 30). In *Pershing* the court was clearly faced with the question of whether in a multiple claim and inadequate fund limitation situation, an admiralty court should modify its traditional injunction and permit some of the claimants to establish claims in a common law court. The court carefully analyzed all the leading decisions dealing with the Limitation Act, including those relied on by the respondents in the instant case, and concluded that the admiralty court should retain jurisdiction in the case of multiple claims which exceed the limitation fund and in which the right to limit is disputed.

Recently, the United States District Court for the District of Illinois had occasion to agree with and follow *Pershing,* noting that:

> "* * * Upon a timely petition filed under Section 185, a shipowner has an absolute right to have the issues tried in the limitation proceeding whenever it appears that the value of his interest in the subject vessel is less than the aggregate of all claims pending against him based upon an alleged fault of the vessel." *Petition of Indiana Farm Bureau,* 235 F. Supp. 800, 801 (1964).

A Virginia district court in the recent case of the *San Jacinto,* 238 F. Supp. 928, 931 (E.D. Va. 1965) points out that the time element involved in connection

with the filing of a limitation proceeding, together with the fact situation, insofar as multiple claims, must also be given consideration by the district court in determining whether to dissolve the injunction against collateral proceedings.

> "Claimants rely upon the leading case of *Langnes vs. Green,* 282 US 531, 1931 AMC 511,, as authority for opening the monition to permit further proceedings in the civil actions. The distinguishing feature in *Langnes* is that a single claim was there involved and the Supreme Court expressed 'doubt upon the good faith of petitioner' in alleging fear that other claims might be filed. Moreover, and of even greater importance, is the fact that the civil action was filed in the state court prior to the filing of the petition for limitation of liability—in fact, the petition was filed only two days prior to the scheduled state court trial of the civil action. Jurisdiction of the state court had already attached in *Langnes,* and the advantage of the limitation proceedings could have been obtained by a proper pleading in the state court as there was only one possible claimant and one owner. It was for these reasons alone that the Supreme Court ruled that the injunction against the state action should be dissolved, with a retention of jurisdiction as to the petition for limitation of liability in the event the state court should elect not to consider the limitation aspect of the case.
>
> "The foregoing is in sharp contrast to the multiple claim-inadequate fund situation which is herein presented."

By contrast, there are at least four separate claims which have been asserted in the instant case and the pe-

tition to limit liability was filed in good faith more than six months after the casualty. No civil action was pending in any court when the petition was filed and only one claimant has requested permission to file such action.

An analysis of the instant case supports retention of admiralty jurisdiction as (1) multiple claims are involved (2) there is an inadequate fund (3) no previous civil action was pending.

II

Appellants' Effort to Reduce the Number of Claims was Ineffectual.

During oral argument on the motion, appellants' proctor offered to abandon the individual claims of Captain Anderson and the two crew member respondents if the court felt it "necessary" as an additional prerequisite to dissolving the injunction (R. Vol. II, 4). It should be noted, however, that in the continuing posture of the case, said claims were never abandoned.

Secondly, it is doubtful whether appellants as an alleged "trustee" could properly prosecute or abandon the claims of Linville and Winters.

The initial claims asserted by the crew members (R. 3) were broad enough to include claims for personal injury. If such claims exist they may not be assigned or transferred to another for prosecution. *Rorvik* v. *North Pacific Lumber Co.,* 99 Or. 58, 190 P. 331, 195 P. 163 (1921); Anno: *Assignability of Claim for Personal Injury or Death,* 40 A.L.R.2d 500. Though the crew mem-

bers have released the FV BETTY from all claims, including personal injury claims, there is no consideration set forth therein which will support release of the FV EAGLE or her owners. *United Fruit Co.* v. *United States,* 186 F.2d 890 (4th Cir., 1951); see generally, Release, 76 C.J.S. § 10.

III

Appellants are Not Entitled to Proceed in State Court Where Limitation Contested.

The motion to dissolve the restraining order was properly denied on another important ground. Appellants, by their answer, strongly contested all issues in the limitation proceedings, including valuation, sufficiency of the stipulation, seaworthiness of petitioners' vessel and the lack of privity (R. 17-18).

In *Ex Parte Green,* 286 U.S. 437 (1932), a sequel to *Langnes* v. *Green* cited by appellants, the United States Supreme Court held that a claimant wishing to proceed with an action against the shipowner in a state court must, *inter alia,* concede the issues raised by the limitation proceeding which are within the sole jurisdiction of the admiralty courts. In that case, the District Court for the Western District of Washington had held that:

> "To pursue common-law remedy in the state court, the suitor must admit the right to limit liability, thus withdrawing from the case any federal question, and his recovery, if any, will be limited to the value of the schooner; and, if issue is taken upon the right to limit, then this court has jurisdic-

tion of the entire controversy." *The Aloha. In re Langnes,* 56 F.2d 647, 648 (1932).

On direct appeal, the Supreme Court affirmed and amplified its former opinion in the matter:

> "It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's right to a limited liability, and that if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case." 286 U.S. 437, 439 (1932).

This court has followed the two *Langnes'* opinions and indicated that a claimant who might otherwise be entitled to proceed in state court will not be permitted to do so where he has contested the right to limit liability. In *Red Bluff Bay Fisheries, Inc.* v. *Jurjev,* 109 F.2d 884, 885 (1940), Judge Healy set forth some of the conditions precedent to dissolving the injunction against collateral proceedings. He noted that only one claimant had appeared in response to the monition and it was not contended there might be others. Also, the right to limit liability was conceded by claimant and under such circumstances a common law proceeding was permissible. In this case, however, not only are there multiple claimants and an inadequate fund, but appellants have contested the right to limit liability and appellant Clatsop Fisheries, Inc. was therefore properly precluded from filing its proposed action in the Oregon state courts.

IV

Appellants Not Entitled to Proceed in State Court Where Value of the Limitation Fund is Contested.

The appellants have excepted to the stipulation for value filed by petitioners and by their answer have contested valuation of the EAGLE as alleged in the petition to limit liability (R. 17).

Even under the broader rule adopted by the Court of Appeals for the Second Circuit permitting state court proceedings by a single claimant who agrees only that the admiralty court may try the *issue* of limited liability, such claimants have been required to concede the adequacy of the stipulation for value filed by petitioners in the limitation proceeding. *Petition of Red Star Barge Line,* 160 F.2d 436, 437 (1947) ("* * * conditioned the order upon her concession of the correctness of the limitation fund.") *Petition of Moran Transportation Corp.,* 185 F.2d 386, 387 (1950) ("* * * that she concede in writing the adequacy and amount of the stipulation for value.") See also Gilmore and Black, *The Law of Admiralty,* 695 (1957).

It is submitted that, in any event, the district court properly declined to dissolve the injunction where appellants had excepted to the stipulation for value.

V

The District Court Exercised Its Sound Discretion in Retaining Admiralty Jurisdiction.

The determination to retain the entire case within the admiralty jurisdiction was one within the court's sound discretion.

That appellants have shown no pressing reason why they should proceed in the state court is amply pointed out in the transcript of the argument (Vol. II, R. 11-12).

> "THE COURT: Mr. Fredrickson, what is the disadvantage to your client in going forward in the usual and customary manner in the limitation proceeding?
>
> MR. FREDRICKSON: Pardon me?
>
> THE COURT: What is the disadvantage to your client?
>
> MR. FREDRICKSON: In having the case tried here rather than in the state court?
>
> THE COURT: Yes.
>
> MR. FREDRICKSON: No. 1, we think he is entitled to have the case tried in state court.
>
> THE COURT: I can't go along with you that he is entitled to. You certainly have to make some kind of a showing, under the facts of this case, to bring him within any right of any kind to have it tried in the state court."

The appellants have not made such a showing. Their claims exceed the limitation fund and there is still a multiplicity of claims with one claim for the value of the vessel by Clatsop Fisheries (R. 18, 20), a separate

claim by Arthur Anderson for personal effects (R. 20), and a further claim by respondents for the crew members (R. 21).

CONCLUSION

The appellants have in effect denied all issues to be determined in the limitation proceeding, i.e. privity and knowledge, value, and damages, which will necessitate a full scale trial of all issues in that proceeding. At the time the limitation petition was filed there was no pending proceeding in any other court although more than six months had elapsed since the casualty. The conditions proposed by respondents are so complicated and varying from appearance to appearance that it is difficult to determine what issues would be tried in each proceeding. Under these circumstances to allow respondents to proceed in a state forum would result in two trials with no apparent benefits to either party.

It is submitted that the court's ruling was entirely within its sound discretion, in accord with existing authority, and that this appeal should be dismissed.

Respectfully submitted,

Jerard S. Weigler
Rockne Gill
Proctors for Appellees

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ROCKNE GILL
Attorney